APPENDIX F

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

UNITED STATES
v.
LAUREN W. GIBBS ET AL.

(Decided November 21, 1973)

Appeal from the decision of Administrative Law Judge John R. Rampton dismissing the contest complaint and holding valid the south half of Sorefoot Gravel No. 10 placer mining claim (Nevada 067140).

Affirmed.

Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability--Rules of Practice: Evidence

In a contest of the validity of a mining claim located for a common variety of mineral prior to July 23, 1955, the absence of any

development of the claim or any sales of the minerals may raise a presumption that the market value of the minerals was not sufficient to justify the cost of their extraction, processing and delivery. However, this presumption may be overcome by credible evidence showing that the materials could have been extracted, removed and marketed at a profit.

Mining Claims: Contests--Mining Claims: Discovery: Marketability--Mining Claims: Determination of Validity--Rules of Practice: Evidence

In a government contest of the validity of a mining claim, a showing which merely establishes that a given market is receiving an adequate supply of the mineral in question to meet the demand is an insufficient basis upon which to rest a conclusion that minerals from the contested claim are not marketable at a profit.

Mining Claims: Generally--Mining Claims: Contests--Mining Claims: Discovery: Marketability

The marketability test requires the claimant to demonstrate that the mineral from his specific claim is capable of meeting the requirements of the market in terms of quality and price and that the quantity and quality of

the mineral and the character of the deposit are such that he can reasonably expect to supply this market at a profit on a sustained commercial basis. However, this does not require the claimant to show the existence of a demand for the material on his specific claim; but a showing of marketability may be established by circumstantial evidence.

Mining Claims: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability

The holding of a mining claim for future development without present marketability does not impart validity to a claim. The location of claims for the purpose of securing reasonable reserve supplies is not prohibited by the mining laws, but claims so located must meet the same standards and pass the same tests of validity as other claims, including marketability. But where the claimant has demonstrated that his claim meets these standards, his election to retain the deposit intact as a reasonable reserve for future use will not operate to invalidate an otherwise valid claim.

APPEARANCES:

Otto Aho, Esq., Field Solicitor, United States Department of the Interior, Reno, Nevada, for the appellant; John W. Bonner, Esq., Las Vegas, Nevada, for the appellees.

OPINION BY MR. STUEBING

The Bureau of Land Management has appealed from the May 5, 1971, decision of the Administrative Law Judge 1/, who dismissed the contest complaint against the south half of the Sorefoot No. 10 placer mining claim on the basis of his finding that a discovery of a valuable mineral deposit was effected prior to July 23, 1955, and continues to the present time.

The contest was initiated on charges (1) that valuable minerals have not been found within the limits of the claim so as to constitute a valid discovery, and (2) that there has been no discovery of a valuable mineral because the mineral materials present could not be marketed at a profit prior to the Act of July 23, 1955, (which removed deposits of common varieties of sand and gravel from location under the mining law thereafter).

The validity of a mining claim located prior to July 23, 1955, for a common variety of sand, gravel or other material specified

1/ The title "Administrative Law Judge" has replaced that of "Hearing Examiner" by order of the Civil Service Commission, 37 F.R. 16787. Title 43 CFR was appropriately amended, 38 F.R. 10939.

in the act of that date can be established only by showing the requirements of a discovery were satisfied before the date of the act. Those requirements include a showing that the material on a claim could have been profitably mined and marketed on that date. United States v. Coleman, A-28557 (March 27, 1962), aff'd, United States v. Coleman, 390 U. S. 599 (1968); Palmer v. Dredge Corp., 398 F.2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969). Further, it must be shown before a patent issues that at the time of the application for patent "the claim is valuable for minerals." Best v. Humboldt Mining Co., 371 U. S. 334, 336 (1962); United States v. Thomas, 1 IBLA 209, 78 I.D. 5 (1971). Such a claim cannot be sustained on the basis of the prospective value of the mineral. Foster v. Seaton, 271 F.2d 836 (D. C. Cir. 1959), cert. denied, 364 U. S. 814 (1960).

The Sorefoot Gravel No. 10 and No. 11 claims were located by Tom Stewart and his associates in 1953. The No. 10 claim embraced the SW 1/4 and the No. 11 claim embraced the SE 1/4 of sec. 21, T. 21 S., R. 60 E., M.D.M., approximately 5 miles from the city limits of Las Vegas. In 1955 the two claims were sold to J. W. Allen and Joseph

Blasco. They, in turn, sold the south half of the two claims to Gornowich Sand and Gravel Company in 1958. That company drilled a 600 foot water well and installed a small capacity processing plant on the south half of the No. 11 claim. This operated at a profit, utilizing only material from the south half of the No. 11 claim. The Gornowich Sand and Gravel Company then sold the two half-claims, which passed, through mesne conveyances, to the present owners. 2/

The severance of the Sorefoot Nos. 10 and 11 in 1958 had the effect of creating four claims where previously there were two. Thereafter, each of the four claims had to have been supported by a qualifying discovery within its own boundaries and each such discovery must have been made prior to July 23, 1955. United States v. Crossland, A-30998 (April 18, 1969). Therefore, one of the issues in this case is whether, at the time of severance in 1958, the south half of the Sorefoot No. 10 claim contained within its boundaries a qualifying discovery of a valuable deposit of sand and gravel, which discovery was made prior to July 23, 1955, and

2/ Lauren W. Gibbs, William G. Gibbs, S.B. Cohen, C.J. Lyles, A.E. Cahlan, R.J. Moore, Clifford A. Jones, George Von Tobel and C.D. Baker.

maintained to the time of the present challenge.

It is undisputed, and all the mineral experts who appeared so testified, that virtually the entire claim contains good sand and gravel. The original notice of location of the Sorefoot No. 10 states that the discovery work consisted of trenching approximately 40 yards of gravel at a point approximately 500 feet from the southeast corner of the claim, which is well within the south half. The various experts who examined the claim testified that they found an excavation approximately as described in the location notice. (Tr. 59, 75). No evidence was presented to show that the discovery work was not in fact performed as described. Accordingly, we must conclude that the initial exposures of sand and gravel were accomplished prior to July 23, 1955, on the contested portion of Sorefoot No. 10. 3/

3/ The charge in the contest complaint specified that the materials "could not be marketed at a profit prior to the Act of July 23, 1955." All of the Government's evidence was addressed to establishing the invalidity of the claim as of that date. (Tr. 1, 30, 33, 53, 54, 55, 59, 61). The Judge's decision was premised upon his finding that a valuable mineral deposit was perfected on the claim prior to July 23, 1955, and continues to exist to the present time. Likewise, the appellant's brief related to the validity of the claim on July 23, 1955. There is nothing

In 1966 Gibbs and his co-owners filed an application for patent (Nevada 067140) covering the south half of both claims, which were leased that year to Stocks Mill and Supply Company, Inc., an established company that has operated in Las Vegas for the past 30 years. Stocks Mill and Supply installed a new plant on the site previously occupied by the Gornowich Sand and Gravel plant, and immediately began producing concrete aggregate, roofing rock, mortar sand and Type 2 base material. The company uses most of the concrete aggregate, which is delivered to its ready-mix concrete plant at a different location. Its operation has been profitable since its inception.

Almost all of the production has come from the south half of Sorefoot No. 11. However, in 1969 Stocks Mill and Supply opened a

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fn. 3 (Cont.)
whatever in the record which suggests that any other date was the critical one. However, independent inquiry by a member of this Board elicited the information that, according to the official records of the Bureau of Land Management, the land occupied by the contested claim was included within the scope of Classification Order No. 95, published on October 8, 1953, 18 F.R. 6412, which classified the land as suitable for disposal as small tracts. On January 15, 1955, the Department published

pit on the south half of Sorefoot No. 10 and extracted, processed, and sold at a profit 4,000 to 8,000 yards.

The sand and gravel claims immediately adjacent to the north, east, and south were patented during the 1960's, including the north halves of the Sorefoot No. 10 and the Sorefoot No. 11. Pursuant to the patent application here in question, the BLM approved for patent the south half of the Sorefoot No. 11. The initiation of this contest against

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fn. 3 (Cont.)
a regulation which provides that a classification under the Small Tract Act would segregate the land so classified from all appropriation, including locations under the mining law. This means that the critical date for determination of the validity of the claim was either October 8, 1953, or January 15, 1955. See United States v. Clear Gravel Enterprises, 2 IBLA 285, 298, fn. 6 (1971). This information is evidence of which official notice must be taken. 43 CFR 4.24(b). In other circumstances this might well have a devastating impact on the entire proceeding, but in this instance the efficacy of the proceeding was preserved by reason of the fact that virtually all of the evidence adduced by the contestee related to conditions as they existed in 1953 and subsequently. (Tr. 9, 14, 15, 16, 17, 18, 27, 28, 33, 57, 59, 60, 61, 63, 73, 74, 76). Therefore, either deliberately or fortuitously, contestees' evidence covers all the possible critical dates.

the south half of the Sorefoot No. 10 placer claim was based upon the following conclusion in the 1967 report of the BLM mineral examiner (Exh. G-4):

> No mineral material has been marketed from /the south half of/ Screfoot Gravel Claim No. 10. It is therefore concluded that a valid discovery has not been demonstrated.

At the hearing Thomas Schessler, a mining engineer employed by the Bureau of Land Management, who first examined the claim in August 1969, testified that the claim lies on the north side of West Tropicana Avenue; that it is composed almost entirely of sand and gravel deposits; that it is substantially the same all over the entire portion of the claim involved here; that the material is suitable for almost any purpose for which sand and gravel can be used; that it compares favorably with other such deposits found in the Las Vegas Valley. (Tr. 50, 51).

Schessler testified further that he found nine pits or cuts opened on the claim, the longest being a bulldozer cut about 105 feet in length, the deepest being eight feet. (Tr. 48). He testified that the new pit from which commercial production had begun covered

about 2 1/2 acres, involving the removal of up to 4000 yards, a figure which he conceded was "strictly an estimate" and "not a very good one". (Tr. 50).

Schessler stated that in preparing for the mineral examination he "studied some economical analysis that go back some time," and some reports of the sand and gravel in the area, but he did not testify as to what they revealed. (Tr. 46). In fact, Schessler, the only Government witness, presented no testimony at all concerning the economic state of the sand and gravel market in the Las Vegas area circa July 23, 1955, or the ability of the locators to profitably participate in that market with the material from the contested claim, other than to express his opinion that they could not have done so. The basis of that opinion is explained in the following colloquy on direct examination (Tr. 55):

> "Q. Another of the charges filed against the claim in question is that there has been no discovery of a valuable mineral because the minerals present cannot be marketed at a profit now, or could not be marketed prior to the Act of July 23, 1955. Do you concur?
>
> "A. I do.
>
> "Q. Upon what facts do you base your

concurrence?

"A. Well, to me it would seem perhaps odd that a claim would lie idle for fourteen years before there were any obvious attempts to produce from it. There is no evidence of any production of marketing from the claim more recently than a month ago.

MR. AHO: I have no further questions.

On cross examination Schessler further stated the basis of his opinion as follows (Tr. 60):

"Q. * * * The locators of the claim did their discovery work by digging a hole and describing it and you have admitted, yourself, that you can go out there and determine that its all good gravel. You have admitted it. * * * You admit that the testimony shows this entire claim is covered with good gravel, so there was a valid discovery and that discovery is on the portion that is now under question. The south part of Sorefoot Number 10. The only discovery work that was shown in the discovery notice is on that part. Now, the testimony shows that there was good gravel. The testimony shows that gravel from that same area could be operated at a profit. What you do you mean by saying that the competition was so much that they couldn't make a profit? Can you explain that?

"A. Did I say that?

"Q. I think you did.

"A. I think I said the competition was satisfying the market at that time. There might be some question as of market ability. (sic)

In his decision (p. 4), the Judge held that the Government's showing that there was no production raised a presumption that there was no market, and this was sufficient to establish a prima facie case for the contestant. See Foster v. Seaton, supra. This is consistent with our holding in United States v. Stewart, 5 IBLA 39, 79 I.D. 27 (1972), and we will not overturn it. However, in light of a recent Court of Appeals consideration of the value of such evidence, we must observe that a prima facie case could hardly be supported on any weaker basis. The Court held that in determining marketability of minerals found on a sand and gravel claim for the purpose of deciding the validity of the claim, evidence of sales is only one factor to be considered in the application of the prudent man and marketability tests, and lack of evidence as to sales made from the claim and the fact that there was other material available does not constitute the substantial evidence required to support the conclusion that the claim is null and void for lack of discovery of a valuable mineral deposit. Verrue v. United States,

457 F.2d 1202 (9th Cir. 1972), reversing United States, v. Verrue, 75 I.D. 300 (1968).

Numerous sand and gravel claims have been patented in the immediate vicinity of the contested claim. In fact, as previously noted, sand and gravel claims have been patented on lands adjoining the Sorefoot claims to the east, north and south (Exh. MC-1). Moreover, pursuant to the application at issue in this case, the south half of the Sorefoot No. 11 has been approved by the Bureau for patent. The decisions to issue these patents involved, in each separate instance, a determination that the material from these claims could have been marketed at a profit prior to July 23, 1955. Yet we are asked to hold that this material, which is indistinguishable from that on claims adjacent on three sides, could not have been marketed then. On what basis can we so hold? The quantities and quality of the sand and gravel are similar, access is excellent, the hauling distance is not significantly greater than from the patented claims to the east and no greater than from those to the north and south, and no special problems or difficulties in the extraction, removal or processing of the

material have been identified which are peculiar to this particular claim. In short, all of the evidence shows that this claim, which the Bureau maintains is invalid, is physically identical in every pertinent aspect to the claims adjacent on three sides which the Bureau has held are valid.

Appellant's principal contention is that the Judge erred in finding that material from the claim could have been marketed profitably prior to July 23, 1955, and since that date. This contention is based upon the fact that there was no commercial production from the claim until 1969. Appellant maintains that this failure to enter the competitive race to supply the market precludes a finding that there existed a demand for the material from this specific claim, as opposed to a general demand for this type of material, and "contradicts any speculative, hypothetical and theoretical evidence the claimant may offer that because others developed sand and gravel pits and sold material the claimant could do so as well," citing United States v. McCall, 2 IBLA 64, 78 I.D. 71 (1971), and Osborne v. Hammitt, Civ. No. 414 (D. Nev., August 19, 1964). 4/

4/ United States v. Higbee, infra, fn. 5, is

Evidence relating to past conditions bearing upon whether the claimants could have marketed material from their claims at a profit, e.g., quality and quantity of material, costs of extraction, removal and beneficiation, existence and size of the market, unit prices then prevailing, hauling costs and distances, etc., is not speculative, hypothetical, or theoretical by definition. Such evidence, whether real or parol, may be entirely factual. The conclusion based upon such facts is, of course, hypothetical, since it

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fn. 4 (Cont.)
of particular interest to the extent that it involved the Gravel Pit No. 5 claim. Portions of that claim were overlapped by portions of the Sorefoot Nos. 10 and 11, so that case was concerned with what probably is part of the same deposit with which we are concerned here. That decision held:

"To satisfy the requirements for discovery on a placer claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed and marketed at a profit as of that date; and where the evidence shows that there is an abundant supply of similar sand and gravel in the area of the claim, that sand and gravel was being produced and sold in the area on July 23, 1955, and that no sand and gravel had been or was being marketed from the claim on July 23, 1955, the fact that at most the material on the claim

relates to what could have been done in the past (the test imposed by this Department and the courts), but the hypothetical or theoretical nature of the conclusion does not characterize the evidence upon which it is based. To treat such evidence as speculative, hypothetical and theoretical and therefore insufficient to rebut the presumption is to give the presumption conclusive effect.

On the other hand, in any given case evidence of past conditions may well be so vague, uncertain, conjectural and inconclusive as to be fairly described as speculative and of insufficient weight to overcome the presumption of non-marketability.

Where, as in this case, the testimony shows that at a particular time the hauling cost was four cents per yard mile, based upon actual experience, such evidence is not to be discounted as "speculative, hypothetical or

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fn. 4 (Cont.)
was suitable for commercial uses and theoretically could possibly have been marketed at a profit as of July 23, 1955, is insufficient to show that material from the particular claim could have been profitably removed and marketed as of July 23, 1955, and the claim is properly declared null and void." (Underscoring added).

theoretical." But if, in another case, the showing was only that a profit might have been made if it had been possible to haul at four cents per yard mile, without establishing that figure as the actual or reasonable rate then prevailing, such evidence might well be regarded as insufficient. In Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971), a divided opinion, the majority simply rejected the claimant's speculative contention that marketability could be shown where one might anticipate an increased market and a depletion of better quality reserves; i.e. Barrows' gravel was inferior to what the market was accepting in 1955, and no amount of speculation concerning the possible alteration of circumstances could improve it. By contrast, in the case at hand there is direct testimony from both sides that the quality is good for all purposes, and would have been accepted by the market.

It has repeatedly been held that proof of actual sales of minerals from the claims is not an indispensable element in establishing their marketability, and that while lack of development and sales may raise a presumption that the market value of the minerals found thereon was not sufficient to justify

the cost of their extraction, this presumption may be overcome by evidence showing that the materials could have been extracted, removed and marketed at a profit before July 23, 1955. This rule rests on a strong foundation. Verrue v. United States, supra; Barrows v. Hickel, supra; Palmer v. Dredge Corp., supra; Multiple Use, Inc. v. Morton, Civ. No. 71-211 PCT-WCF (D. Ariz. Nov. 9, 1972); United States v. Penrose, 10 IBLA 332 (1973); United States v. Harenberg, 9 IBLA 77 (1973); United States v. Humboldt Placer Mining Co., 8 IBLA 407 (1972); United States v. Lloyd O'Callaghan, Sr., 8 IBLA 324 (1972); United States v. The Dredge Corp., 7 IBLA 136 (1972); United States v. Stewart, (1972), supra; United States v. Isbell Construction Co., 4 IBLA 205, 78 I.D. 385 (1971); United States v. McCall, 7 IBLA 21, 79 I.D. 457 (1972) United States v. Stewart, 1 IBLA 161 (1970); United States v. Pierce, 75 I.D. 270 (1968).

If proof of development and profitable sales is not the sine qua non of a valid mining claim, then we must hold that the presumption raised by the absence of development and sales can be overcome by proof that the claimants' showing that they could have extracted and sold material from the claim at

a profit prior to July 23, 1955. This entails a showing of the market which then existed, the cost of extraction and processing which would have been incurred, the transportation charges which would have been involved, the unit price which then prevailed and the profit which claimants might have realized if they had elected to proceed at that time. This evidence of what the claimants could have done is, presumably, the "speculative, hypothetical and theoretical testimony" which the court said could not contradict their failure to actually do it in Osborne v. Hammitt, supra, and which the court held was sufficient in Verrue v. United States, supra.

In our opinion, such evidence of what the claimant could have done at the time, had he so elected, if credible, must be allowed to rebut the presumption of non-marketability raised by the lack of development and sales. It may not be excluded or held to be "insufficient" by characterizing it as "speculative, hypothetical or theoretical." This, essentially, was the holding in Verrue v. United States, supra. Otherwise, the presumption would be converted to an irrefutable conclusion because the true test (of what the claimant could have done) would not be

susceptible of proof. In United States v. Harenberg, supra, we held:

> A favorable showing of bona fides in development is recognized as one the factors which can serve to demonstrate the marketability of a mineral from a particular deposit, but development is not a requirement of the law and the fact of development or nondevelopment is merely evidentiary, the test being whether the present capability of profitably extracting the mineral exists, and, where location was barred after a given date, whether the mineral could have been extracted and removed profitably prior to the critical date.

As pointed out in the opinion below, the Court held in Barrows v. Hickel, supra, p. 82, that actual, successful exploitation of a mining claim is not required to satisfy the prudent man test, noting that the Secretary had not required the appellant in that case to prove that he had an economically successful operation prior to July 23, 1955.

Accordingly, it is our opinion that the holding of the District Court on this point

in Osborne v. Hammitt, supra, and cases following, has been effectively negated by the subsequent holdings of the Court of Appeals in Barrows v. Hickel, supra, and Verrue v. United States, supra. 5/

Appellant, in its statement of reasons for appeal, states: "If the market is already being fully supplied or satisfied by other deposits, obviously additionally available material from other claims cannot be termed to be 'marketable'." The origin of this "notion" 6/ is unknown, but judging by the frequency of its appearance, it is strongly rooted despite its inherent fallacy. In the affluent, business oriented American society, well served by interconnected transportation systems, almost all normal consumer demand is somehow supplied.

5/ United States v. Higbee, A-31063 (April 1, 1970), aff'd. Higbee v. Morton, Civil No. 1674 (D. Nev. May 5, 1972) 3/; United States v. Clear Gravel Enterprises, Inc., 2 IBLA 285 (1971); United States v. McCall, (1971) supra; United States v. Osborne, 77 I.D. 83 (1970); United States v. Clark County Gravel, Rock & Concrete Co., A-31025 (March 27, 1970); United States v. Benson, A-31061 September 4, 1969); United States v. Pierce, 75 I.D. 270 (1968); United States v. Ramstad, A-30351 (September 24, 1965); United States v. Humphries, A-30239 (April 16, 1965).

6/ The characterization of this proposition

This has never indicated that the market was closed to competition, particularly if the emerging competitor could offer lower prices, better quality, faster delivery, or other inducements. The mere fact that the needs of a particular locality may be fully supplied by one or more gasoline stations, grocery stores, restaurants or lumber yards in no way foredooms the efforts of those who would attempt to capture a portion of those markets. This issue should now be resolved by the pronouncement of the Court in Barrows v. Hickel, supra, which held that the claimant's ability to meet the marketability test cannot be made to depend on the extent of the market not already preempted by established operators.

We conclude that a showing which merely establishes that a given market is receiving an adequate supply is an insufficient basis upon which to rest a conclusion that supplies from another source are not marketable at a profit.

It is where the market is saturated by a super-abundance of top quality goods from competitive sources at prices near the irreducible minimum that the advent of yet

fn. 6 (Cont.)
as a "notion" was applied by the Court in Barrows v. Hickel, supra, at page 83.

another would-be supplier must be viewed with the proverbial "jaundiced eye." United States v. The Dredge Corporation, supra. Similarly, where demand is limited to a very few consumers who supply their needs from their own sources, so that the market is "closed" or "captive," we have held, quite properly, that a mining claimant must prove that the consumers will buy the produce of his claim at a profit, failing which it will be assumed that his mineral deposit has no economic value and does not qualify as a discovery. United States v. Duval, 1 IBLA 103 (1970), aff'd. Duval v. v. Morton, 347 F. Supp. 501 (D. Oregon 1972); United States v. Bartlett, 2 IBLA 274, 78 I.D. 173 (1971).

Other cases rest on a finding that the deposit was too remote from the market, United States v. McCall, 1 IBLA 115 (1970), or based upon speculation that a market would develop, United States v. Isbell Construction Company, supra, or where the quantity or quality was so deficient that mining operations could not be justified, Hendrikson v. Udall, 229 F. Supp. 510 (D. Calif. 1964), aff'd., 350 F.2d 949 (9th Cir. 1965), cert. denied, 380 U.S. 940 (1966), or where no

established market for the material existed, United States v. Pulliam, 1 IBLA 143, (1970), or where some physical impediment would make production costs prohibitive, United States v. McCall, 7 IBLA 21, 79 I.D. 457 (1972).

Another oft-stated misconception, encountered again in this case, is the proposition that "To satisfy the marketability test, a mining claimant must show the existence of a demand for the material on his specific claims, and not simply a general demand for the type of material in question." 7/ To require this of the claimant is to impose, in most instances, an impossible burden on him. The buyers of common sand, gravel, rock, cinders, etc., ordinarily could not care less which claim their supplier (or his supplier) took it from, so long as it was legally obtained and the price is competitive. Those whose demands create the market are unlikely even to be aware of a particular claim as an undeveloped potential source of supply, and, if they were, it is unlikely that they would generate a demand for the produce of

7/ We must acknowledge our own contribution to the perpetuation of this fallacy. See, e.g., United States v. McCall, 2 IBLA 64, 78 I.D. 71, 80 (1971), United States v. Osborne, 77 I.D. 83 (1970); and cases therein cited.

that specific claim in the absence of a critical shortage. This is in no way indicative that the material from that claim was, or is, precluded from the existing profitable market.

The origin of this misconception seems to lie in the inversion by restatement of the perfectly valid proposition to the effect that a mining claimant must show that material from his specific claim can supply an existing market demand for such material at a profit. United States v. Pierce, supra; United States v. Boyle, 76 I.D. 318 (1969); United States v. Stewart, (1972), supra. It is nothing more than a simple expression of the marketability test which was approved by the Supreme Court in United States v. Coleman, supra. This is altogether different from requiring the claimant to show the existence of a demand for the material from his specific claim.

At the hearing testimony was presented by Ernest Thacker, who owned and operated the south halves of Sorefoot Nos. 10 and 11 in 1958 under the name of Gornowich Sand and Gravel Company. Thacker said that his company tested both claims, doing "an analysis of depths to determine the method of processing aggregate without a waste of materials." He said the test results were excellent,

producing various types of aggregates of all sizes (Tr. 22). The plant was located at the east end of Sorefoot No. 11 because from there it was only a quarter-mile to a paved road. He said, "It was set up on this end purposely to work right straight back /west/ and to move the plant after this section was worked out." (Tr. 26). He took material from the Sorefoot No. 11, and none from No. 10, except for testing, but stated that it was the company's intent "to work it all the way back into 10," and the material on No. 10 was of such quality that it could have been operated at a profit. (Tr. 26). Thacker testified that Gornowich Sand and Gravel made a profit on its Sorefoot operation. The haul distance was five or six miles at a rate of four cents per yard mile. (Tr. 25). He stated that a reasonable man would be "absolutely" justified in expending his capital and time in mining sand and gravel on No. 10 today with a reasonable expectation of profit. When asked if this would have been true in 1953, he replied, "I thought so at the time," stating that he was in the business then. (Tr. 27). Thacker said that he saw no reason to take material from No. 10 when "you have material in front of you." However, he stated that it was his intention to hold No. 10 as a reserve because,

"There wasn't enough in front of us for a several years' supply," and "nobody goes in with a small deposit." (Tr. 32). He testified to a substantial increase in the market demand for sand and gravel in the area between 1953 and 1955. (Tr. 33).

Virgil F. Gilmore, President and General Manager of Stocks Mill and Supply Company, Inc., the present lessee, testified that he had been employed by the company since 1946. 8/ He testified that the company is getting $1.75 to $2.00 per ton for Type 2 base material produced from the Sorefoot claims, and that it used most of the concrete aggregate in its own operations to make ready mix cement, the aggregate being charged out at $2.75 per yard for accounting purposes. (Tr. 9, 10). He stated that before the company moved onto the claims, representative samples were taken from different parts of No. 10 and No. 11 and delivered to a testing laboratory. The result was given to an engineer, and the finding was that the material from No. 10 was just the same as the material on No. 11, and that it was

8/ However, at Tr. 16 he stated that he started work with Stocks Mill and Supply Company in 1936. It is assumed that either the witness mis-spoke or that there was an error in transcription.

good quality material. (Tr. 13, 14). The operation is a profitable one. (Tr. 14). Gilmore stated his opinion that it would have been possible to operate the south half of the Sorefoot No. 10 at a profit in 1953, and that a reasonable and prudent man would then have been justified in expending his time and money in developing the claim with the expectation of profit. (Tr. 17). He testified that the pit on Sorefoot No. 10 was opened within the year and a half previous to the hearing, and he estimated that 5,000 to 8,000 tons were removed. (Tr. 19).

James E. Pomeroy, the City Highway Department Testing Engineer for this district, testified that two test holes were dug on the south half of Sorefoot No. 10 and one hole on the south half of Sorefoot No. 11, and that all tests showed the material to be of good quality, suitable for base, and plant mix surfacing. (Tr. 68). The holes were dug with a back-hoe and were seven and a half and eight feet deep, respectively. (Tr. 69).

C. P. Keegel, a mining metallurgical engineer with 35 years experience and a background of experience in sand and gravel operations in Las Vegas, testified for contestees. He testified that he examined the contested claim and adjacent properties over a

two day period and found the quality and quantity of the gravel to be adequate for production and comparable with the adjacent operating properties. (Tr. 69). He estimated the gravel suitable for use in the first five feet of the contested claim to amount to nine hundred thousand cubic yards, and at a depth of 25 feet, allowing for four feet of cemented material, he estimated the volume at 4,000,000 cubic yards, all usable. His tests indicated about 73% of the rock material was one half inch in size. (Tr. 71). After commenting on comparable costs, competition and market demand at present and in 1953, he expressed the opinion that a prudent man would have been justified in 1953 in spending his time and capital to develop the claim with an expectation of profit. (Tr. 76). He was in Las Vegas in 1953. (Tr. 73).

As noted in the decision below, Keegel has prepared a map of the area which shows that the excavation of the south half of claim No. 11 extends to within about 300 feet of the contest claim, and that at the present rate the sand and gravel on No. 11 will be exhausted within a few years.

The Judge found that the presumption of non-marketability raised by the lack of sales of material from the claim in issue was

rebutted by the testimony. We agree.

The Judge further found that the absence of sales was attributable to the fact that the operator chose to put his plant on the adjacent claim and hold the material from the contested claim in reserve. He concluded that the holding of a claim without development as a reasonable reserve supply is a permissable procedure under the rules announced in the case of United States v. Anderson, 74 I.D. 292, 303 (1967), noting that the reserves afforded by the Sorefoot No. 10 were clearly not in excess of the 30-year supply held to be a reasonable amount in the Anderson case. Again, we agree.

The question of the propriety of holding mining claims as reserve sources of supply has been considered in other cases. It is well established that the holding of a mining claim as a reserve of sand and gravel for future development without present marketability does not impart validity to the claim. United States v. O'Callaghan, 8 IBLA 324 (1972); United States v. Stewart, (1972), supra; United States v. McCall, 1 IBLA 115 (1970); United States v. Hinde, A-30634 (July 9, 1968); United States v. Schelden, A-29078 (April 26, 1963); United States v. Fischer Contracting Co., A-28779 (August 21, 1962). But where

the marketability of the deposit has been established for the critical dates by a demonstration that the claimant could then have mined and sold the material at a profit, his election to retain that deposit intact as a reasonable reserve for future use will not operate to invalidate an otherwise valid claim. United States v. Harenberg, supra. The location of claims for the purpose of securing reasonable reserve supplies is not prohibited by the United States mining laws, but claims so located must meet the same standards and pass the same tests of validity as other claims, including a showing of marketability on or before July 23, 1955. United States v. Stewart, (1972) supra, at p. 56.

In Hendrikson v. Udall, supra, the Squaw Valley placer claim was located for sand and gravel in 1949 in the Tahoe National Forest in California, and the land adjacent thereto was located as the Squaw Creek placer claim. The Squaw Valley claim was worked for its sand and gravel for some years prior to 1957, and the Squaw Creek claim had been explored as a possible source of materials when the Squaw Valley placer should be exhausted. That is, the Squaw Creek claim was being held as a reserve. It is noteworthy that neither the

Department nor the courts found that the concept of a sand and gravel claim held as a reserve was in any way inimical to the purpose and intent of the mining law. They each found, however, that sand and gravel did not exist on the Squaw Creek claim in commercial quantities, and held it was invalid for that reason.

A number of judicial and administrative decisions have taken note of the fact that there is super-abundance of commercial quality sand and gravel in the Las Vegas Valley, and that a great many mining claims have been located there for those minerals. See, e.g., Foster v. Seaton, supra; Osborne v. Hammitt, supra; United States v. Osborne, supra; United States v. Clear Gravel Enterprises, Inc., supra.

Moreover, the record of this case reflects that this Department has patented more than 4,000 acres of sand and gravel claims in the vicinity. (Exhibit MC-1). It would seem obvious that the market demand of Las Vegas and environs could not absorb all the material from these sources within the forseeable future, if they were simultaneously available.

These facts, however, cannot operate to deprive the holders of a claim from securing

the recognition and benefit of the law if that particular claim can be shown to meet the legal test imposed for the determination of the claim's validity. It has not been established by the appelant that the market is so saturated with available supplies that material from this claim cannot be profitably utilized. The super-abundant presence of sand and gravel does not establish the fact of a super-abundant available supply. There has been no evidence presented to show that these claimants hold reserves in excess of their reasonable needs, despite the fact that others may hold reserves in excess of their needs. On the contrary, since the long established lessee-operator is utilizing much of the material in its own ready-mixed cement operations, a profitable market for the produce from this claim is better assured than from most. In this aspect of the case its similarity to United States v. Harenberg, supra, is inescapable.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed.

Edward W. Stuebing, Member

We concur:

Newton Frishberg, Chairman

Frederick Fishman, Member

Douglas E. Henriques, Member

Anne Poindexter Lewis, Member

I concur in the result:

Joseph W. Goss, Member

MRS. THOMPSON DISSENTING:

Two main factors in this case are the basis for the majority's opinion. First, this claim was a part of a claim in 1955 but was conveyed out of that claim in 1958, and the claim from which it was conveyed was subsequently patented. While the majority recognizes that the severed claim must qualify by itself for a discovery under the tests for a mining claim as if it had been a separate claim initially (United States v. Crossland, A-30998 (April 18, 1969), the fact that the adjoining claim of which it was once a part was patented seems the main underlying rationale for the result reached in this case. Second, the majority stresses the fact that the Government did not introduce evidence, other than to show the lack of development and sales on this claim. Though not stressed by the majority, very little cross examination of the claimant's witnesses was undertaken, especially to explore further the reasons why Gornowich's President, Ernest Thacker, who testified for the claimant, lost "interest" in the claim "because of the problems involved," (Tr. 26) and other reasons which bear on the question of whether the claim could have been marketed at a profit prior to 1969 when the first actual operation

to remove sand and gravel was undertaken from the claim.

The apparent difficulty in this case is only superficial. In an acute form it poses the question of where a line must be drawn. It also poses the question of what type of proof this Department will accept as credible evidence of compliance with the mining law and implementing judicial and administrative tests, namely, the prudent man and marketability tests, by which compliance has been measured. Further, it raises the issue of who has the ultimate burden of persuasion of presenting credible evidence and what constitutes the preponderance of such evidence. Except for the fact the Sorefoot No. 10 was once part of a claim since patented, it is indistinguishable from many other sand and gravel cases. Once, as the majority recognizes has happened, the 80 acres was separated from the original 160-acre association claim, the case became exactly like all the other sand and gravel cases involving a block of claims, some of which went to patent and some of which were held invalid. Without the initial peculiarity, this case falls easily within the well-trodden path of other sand and gravel cases where evidence such as the majoritiy relies on here was not considered credible evidence of marketability

from particular claims in such a block. Many of these cases are cited in the majority opinion and will be mentioned, infra.

The sine qua non of the validity of a sand and gravel claim during the period of time claims for such material have been deemed locatable under the mining laws, has been the marketability test. While the majority opinion has attempted to fit this case within that test, there are fallacies and unsupported circular reasoning in its arguments. The primary omission in the opinion, however, goes to the reason for the rule and a disregard for the history of the rule, especially as related to sand and gravel. Thus, the sweeping statements made in the majority opinion to bring this case into well-established rules and principles, at most, should be confined only to the peculiar circumstances of this case. A misreading and misinterpretation of the extreme view expressed by the majority here would be a mistake. There has been no attempt to overrule expressly decisions of this Board and prior Departmental decisions which when fully analyzed are contrary to the result and extreme position expressed in the majority opinion. One example suffices, the most recent sand and gravel decision by this Board pertaining to Las Vegas Valley, United States v. Block, 12 IBLA 393, 80

I.D. ___ (1973), where the facts, except for the one fact that this claim here was once part of a claim which has been patented, were much stronger to support the claimant's position than those here. The claim in question in Block was one of a group of sand and gravel claims, one of which went to patent in 1967, the others were declared null and void because of a failure to establish adequate marketability of the product from those particular claims in the absence of satisfactory proof of development and a demand for the materials from the claims prior to 1955. The lack of such proof is the primary basis of the Block case and the many other recent decisions of the Department pertaining to sand and gravel deposits in the Las Vegas Valley. See infra.

Let us now consider briefly the history of sand and gravel claims and the test used to determine the validity of a sand and gravel claim. It was a long time after the mining law of 1872 before common sand and gravel was recognized as a locatable substance. In Zimmerman v. Brunson, 39 L.D. 310 (1910), sand and gravel was suitable for use in making cement. Its chief value was derived from its proximity to a town. Although the land was determined chiefly valuable for the sand and

gravel rather than for other uses, the Department ruled that the land was not mineral in character within the meaning of the mining laws so as to bar nonmineral entries. This ruling prevailed until Layman v. Ellis, 52 L.D. 714 (1929), some 57 years after the mining law. The decision emphasized circumstances where common deposits of sand and gravel were actually being extracted and sold profitably. The Department overturned Zimmerman. It emphasized changed conditions in the trades and mechanical arts, and court and Departmental decisions construing other substances to be mineral. Thus it stated, at 720:

> In Northern Pacific Railway Co. v. Soderberg, (188 U.S. 526, 534) it was held that the overwhelming weight of authority was to the effect that mineral lands include not merely metalliferous minerals, but all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture * * *.

It concluded at 721, that,

> * * * There is no logical reason in view of the latest expressions

> of the department, why, in the administration of the Federal mining laws, any discrimination should be made between gravel and stones of other kinds, which are used for practically the same or similar purposes, where the former as well as the latter can be extracted, removed and market at a profit.

The Departmental decisions referred to were Bennett v. Moll, 41 L.D. 584 (1912); Stephen E. Day, Jr., 50 L.D. 489 (1924); Lee Davenport, (March 20, 1926), unreported [no other identification given]; Charles F. Guthridge, A-11785 (August 3, 1928); where volcanic ash suitable for roofing material and abrasive soaps, trap rock for railroad ballast, amphibole schist suitable for building a local jetty, fractured granite suitable for rip rap railroad ballast and road material (but not as a building stone), respectively, were all held to be locatable under the mining laws where they had positive commercial value for such purposes and were chiefly valuable for such minerals. Thus, the Department in ruling that sand and gravel deposits were locatable under the mining laws intended them to

be locatable only when the sand and gravel was marketable for a profit and the land was more valuable for the sand and gravel useful in the mechanical arts and trades than for other purposes.

Other safeguards were announced a few years later when the Acting Solicitor was requested to overrule Layman v. Ellis. In his opinion, 54 I.D. 294, 296 (1933), the Acting Solicitor responded to the contention that sand and gravel deposits, even if marketable at a profit, should not be locatable under the mining laws. He stressed the safeguards which already existed to prevent abuse of the mining laws:

> The main objection that appeared to the application of this principle to such commonplace substances as sand and gravel, was that it would render facile the acquirement of title to numerous areas containing sand and gravel for other purposes than mining, but this objection may be urged with as much reason against other mineral substances of wide occurrence and ex tent which under the same limitations and qualifications are locatable and enterable under the mining law, such

as, for example, limestone, marble, gypsum, and building stone. Furthermore, the objection mentioned is not of much force when it is considered that the mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit. Cases have been frequent where the Department has refused patent to lands containing the mineral substances last mentioned in abundance where the evidence as to the value of the deposit was insufficient or lacking. No reason is seen, therefore, to overrule the case of Layman et al. v. Ellis. It follows that sand and gravel which can be extracted, removed and marketed at a profit, obtained from land that has been duly and properly located under the mining law as a placer claim, may be lawfully disposed of for use * * *.

Thus, it has never been enough merely to establish that there is a large quantity of widespread minerals of common abundance on a

claim in a favorable location to establish its validity.

As stated by the Court in Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959), after quoting the prudent man test of Castle v. Womble, 455, 457 (1894):

> With respect to widespread non-metallic minerals such as sand and gravel, however, the Department has stressed the additional requirement of present marketability in order to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining.

The Court then went on expressly to quote the factors mentioned in the Acting Solicitor's Opinion, supra, namely, accessibility, bona fides in development, proximity to market, existence of present demand, and other factors which establish that the deposit is of such value that it can be mined, removed and disposed of at a profit. Id.

It further stated:

> The Government's expert witness testified that Las Vegas valley is almost entirely composed of sand and gravel of similar grade and quality.

> To allow such land to be removed from the public domain because unforeseeable developments might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development. Id.

It is difficult to see in the present case how that same congressional purpose is being implemented where nothing was done on this particular claim for 16 years after its location. It is also significant that nothing was done 14 years after Congress, by section 3 of the Act of July 23, 1955, 30 U.S.C. section 611 (1970, definitely and expressly provided that no deposit of common varieties of sand, stone and gravel shall be deemed a valuable mineral deposit within the mining laws of the United States to give validity to any mining claim located after that time. The legislative history of the Act of July 23, 1955, clearly indicates that thereafter the disposition of common types of sand, stone and gravel was to be under the Materials Act of 1947, 30 U.S.C. section 601 (1970), which provides for the sale of such materials without disposing of the land on which they are found, rather than under the mining laws

where land might be patented. United States v. Coleman, 390 U.S. 599, 604 (1968). As a mere location of a claim without discovery creates no rights in a claimant against the United States, the validity of any claim for common varieties of such materials located prior to the 1955 Act has to be determined by proof that there was then a discovery of a valuable mineral deposit of such materials, including satisfactory proof that such materials could then, and continually thereafter, be marketed at a profit. Id.; United States v. Charleston Stone Products, 9 IBLA 94 (1973). 1/

What then is satisfactory proof that the materials could have been marketed at a profit prior to withdrawal from location and thereafter? The majority states that a claimant does not need to show the existence of a demand for the material on his specific claim, characterizing this a misconception, but then stating that he must show that material from his specific claim can supply an existing market demand for such material at a profit.

1/ Judicial review of the Charleston case has been sought. Charleston Stone Products Co., Inc. v. Morton, Civil No. LV-2039-BRT, currently pending before the United States District Court for the District of Nevada.

Semantics does not replace the reason for the present specific demand criterion of the marketability test. It is a non sequitur as to whether a buyer cares from which claim his demand is supplied. It has been firmly ingrained in the application of the marketability test to sand and gravel cases that a specific market be shown for the material from that claim. A showing of a general market for sand and gravel in an area has never been considered sufficient and all of the sand and gravel cases cited by the majority demonstrate that point. This is further illustrated in the Solicitor's Opinion, 69 I.D. 145, 146 (1962). He explained the distinction between intrinsically valuable minerals which by their very nature are deemed to be marketable and other minerals as follows:

> * * * where we are concerned with a nonmetallic mineral found in a great many places, application of the prudent man test requires that a market for the mineral be shown by the locator. The extreme example is probably sand and gravel, which are found in every State. There is a demand for sand and gravel, but in many areas the available deposits far

exceed the market. In such cases we must insist that the locator show that there is a market actually existing for his minerals. To validate any sand and gravel claim proof of present marketability must be clearly shown.

Other cases fall between the two extremes of the intrinsically valuable mineral on the one hand and gravel on the other hand. Each case must be judged on its own merits. When a nonmetallic mineral is not of extremely wide occurrence and when a general demand for that mineral exists, it may be enough, instead of showing an actually existing market for the products of that particular mine, to show that a general market for the substance exists of a type which a reasonably prudent man would be justified in regarding as one in which he could dispose of those products.

To understand what the opinion meant by clear proof of present marketability, the comparison set forth in the second paragraph is revealing. There it points out that instead of showing "an actually existing market

for the products of that particular mine," the general market which a prudent man would be justified in regarding he could dispose of the products from his claim may be sufficient as to nonmetallic minerals not of extremely wide occurrence. It is apparent that marketability relating to sand and gravel clearly requires proof that the material from the claim can be sold.

It is apparent especially from the early Departmental decisions that they envisaged the type of situation where a claimant had an existing sand and gravel operation on his claim at the crucial dates, and by his records of that operation could demonstrate a profit. This is the clearest proof of marketability and satisfies all of the safeguards indicated in the Foster v. Seaton criteria. It would have been in keeping with the safeguards enunciated in that standard for the line to be drawn by requiring proof of an existing profitable operation. The Department, however, in using language such as "could be marketed at a profit" preserved other possibilities of satisfying those safeguards without proof of actual profitable sales only to allow for those exceptional circumstances where proof would be deemed satisfactory to meet the criteria although profitable sales were not made as of the

time for determining the validity of the claim. An example of such a circumstance is where a claim has been developed and is ready to produce material for which there is a commitment, but the transaction has not yet been fulfilled. In such a case all of the criteria of the marketability test expressed in Foster v. Seaton and the many other cases would be met.

The cases cited by the majority for the proposition that proof of sales is not an absolutely essential requirement for proving marketability should be understood with this underlying reason. Bona fides of development, however, has always been an essential criterion. The quotation from United States v. Harenberg, 9 IBLA 77 (1973), is the only Departmental case which suggests that bona fides of development is not essential or may have little evidentiary value. That was not a sand and gravel case. In any event, however, rather than extending any rationale in that decision to sand and gravel cases, I suggest the case be modified in that regard to bring it into line with the consistent and substantial body of law to the contrary. Reliance by the majority is also made on Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972). The opinion in that case expressly recognized,

however, the criteria listed in Foster v. Seaton, under the marketability test, including bona fides of development and present demand. The Court, however, was more persuaded by direct testimony of the contestees' witnesses as to sales and market conditions in the Phoenix, Arizona, area than those of the Government who were not in the area at the time. The Verrue decision is of limited, if any, precedential effect, as it rested on a narrow evidentiary basis, reversing only the findings of fact in United States v. Verrue, 75 I.D. 300 (1968). It in no way purported to make any sweeping changes in the evidentiary standards used by this Department, or in the burden of proof expressed in Foster v. Seaton.

The ultimate risk of nonpersuasion in a mining contest is upon the claimant. As Foster v. Seaton indicated, it is the claimant who must show that the requirements of the law have been satisfied. If there have not been development and sales from a sand and gravel claim, the proof goes to the hypothetical conclusion of whether a claimant could market the material profitably. The dilemma posed by the necessity to determine this hypothetical conclusion is to determine what

evidence is credible to establish it. The majority accepts as credible evidence statements by two witnesses who have been in the sand and gravel business that had the owner of the claim chosen to market the material he could have done so at a profit. The only corroboration of their supposition is the fact that operations were conducted on adjoining lands, and these lands are similar in character. One of the flaws in this reasoning is that lands for miles around in Las Vegas Valley are of a similar character with the same advantages as this land for development.

This fact has been recognized in many of the cases involving sand and gravel in the Las Vegas Valley cited by the majority. In this regard the United States District Court for the District of Nevada in Osborne v. Hammitt, Civil No. 414 (August 19, 1964), quoted in United States v. Osborne, 77 I.D. 83, 90 (1970), stated in part with regard to the fact no development or sales of materials were made from sand and gravel claims prior to 1954, when a hearing was held:

> * * * If the locations of the Bradford sand and gravel claims were made in good faith under a genuine belief of the present profitable marketability of the product, there is no reason why plaintiffs

should not have commenced the removal and processing of the material in 1952 and continued the profitable enterprise through 1954, when the hearing was held. If they had done so, their claims would, perforce of law, have been sustained. Their failure to do so beclouds the reliability and evidentiary weight of the case presented by them.

We do not discount the value of opinion evidence from qualified witnesses in cases dealing with fairly unique deposits of locatable minerals. This case is different. Sand and gravel of the same general quality found in the Bradford Claims is readily available in thousands of adjoining acres. The burden of the proponent, plaintiffs here, is not simply to preponderate in the evidence produced, its burden is to produce a preponderance of credible evidence, and the trier of fact is not required to believe or to give weight to testimony which is inherently incredible. It is apparent from the evidence that if, in June, 1952, owners of other claims near Las Vegas had commenced to produce and market

sand and gravel from their properties, such action would have filled the theoretical void in the supply of the material to the Las Vegas market, rendering the Bradford Claims valueless. The plaintiffs failed to enter the race to supply the theoretical insufficiency of production of sand and gravel. If they had done so successfully, they would have satisfied the requirements of Foster v. Seaton (supra) by proving bona fides of development and present demand. Their failure to so act contradicts the speculative, hypothetical and theoretical testimony on which they rely.

The Court in Osborne v. Hammitt did not state that actual, successful exploitation is required to satisfy the prudent man test, as the majority states. What it did hold was that without sales and development of a claim, testimony by the witnesses in that case that they could have successfully marketed the sand and gravel in the area was not credible because of their failure to try to capture a portion of the Las Vegas market. In no way did Verrue negate this holding of the District Court, as the majority suggests, nor did it negate in any way subsequent Departmental

decisions. The District Court s reasoning is in full accord with the long-standing criteria of the marketability test, which were recognized in Verrue. Semantics of characterization of the Court's statement should not detract from the solid basis underlying the sound rationale of the Court's determination in Osborne v. Hammitt. The direct testimony of witnesses as to what might have been, had the claimant so chosen to enter the race to capture a portion of the market, goes to a conclusion which is by its nature "speculative, hypothetical and theoretical."

In recent decisions of the Department in addition to United States v. Osborne, supra, the underlying rationale of the Court in Osborne v. Hammitt has been followed and mere hypothetical, theoretical and speculative opinion as to the probability of having been able to market sand and gravel profitably in Las Vegas Valley was rejected as credible evidence to support a determination that the claims could have been marketed profitably. These cases discuss the economic situation prevailing with respect to sand and gravel claims in that area in some detail. 2/ Three

2/ Several examples suffice. First, in United States v. Osborne, supra, at 77 I.D. 88, evidence as to the general conditions of sand and

cases have also been affirmed in judgments by the United States District Court for the District of Nevada that the decisions were

fn. 2 (Cont.)
gravel in Las Vegas Valley is discussed:

"The evidence presented at the 1954 hearing (Exhibit C) showed that the material in section 32 is like that found on 100 to 175 other sections in the Las Vegas Valley (1954 Tr. 69, 84-85). The Las Vegas Valley or area is defined as the land within 'roughly a radius of 15 miles from the center of Las Vegas' (1954 Tr. 51). There were 800 to 1,000 mining claims in this Las Vegas area spread over an area of 150 to 175 sections (1954 Tr. 66-67) and with 1 or 2 possible exceptions the 800 to 1,000 claims were located exclusively for sand and gravel (1954 Tr. 50). 75 percent of the Las Vegas area is estimated to be sand and gravel land (1954 Tr. 70). In short the Las Vegas area has an unlimited supply of sand and gravel of the type found in section 32 (1954 Tr. 67, 244). For example, one section of material 3 feet deep could have supplied the 1953-54 level of demand for Las Vegas sand and gravel for approximately 3 years (1954 Tr. 80-81). Section 32 has material perhaps 15 feet deep (1964 Tr. 76). Thus at the time not more than 1 percent of the available sand and gravel in the Las Vegas area could have fully supplied the demand for all of the years in the reasonably foreseeable future (1954 Tr. 79-81)."

A more particular discussion is found in United States v. Clear Gravel Enterprises, Inc., 2 IBLA 285, 291-293 (1971), where the claims were found to be invalid:

"The evidence presented at the hearing showed that the Las Vegas Valley or area is

supported by substantial evidence. They are: United States v. Higbee, A-31063 (April 1, 1970), aff'd, Higbee v. Morton, Civil No. 1974

fn. 2 (Cont.)
situated within roughly a radius of 15 miles from the center of Las Vegas (Tr. 10, 14; Ex. G-9A, G-9B, G-9C, G-9D).

"The bulk of the material found on the lands in the Valley is the same as the sand and gravel found on the claims in question (Tr. 38). There is evidence that the sand and gravel on the claims in question may be over 750 feet deep (Tr. 157). The sand and gravel on a claim a 1/2 mile east of claim No. 12 appears to be at least 200 feet deep (Tr. 220). Because most of the Las Vegas area has a common sedimentary type geological origin, it would be expected that most of the land in the area would show similar depths of sand and gravel (Tr. 11). In short the Las Vegas area has an unlimited supply of sand and gravel. This is illustrated in the evidence by the operation of Wells Cargo, Inc., and the operation of the partnership of J. F. Young, Dugal Young and Ralph Smith d/b/a Young and Smith Construction Company (hereinafter referred to as Young and Smith).

"Wells Cargo, Inc., is currently the largest volume producer of sand and gravel in the area and it has been for most of the past 14 years. Yet it obtained all of the material it now needs or needed, in excess of 10,000,000 tons (or cubic yards), from the western side of the Valley for all these years from an area that currently covers less than 80 acres and which has never covered more than 160 acres and which is now only 40 feet deep at its deepest point (Tr. 219, 220-221, 223-224).

"Young and Smith was the largest (Tr. 224) or second largest volume producer (Tr. 133-134) of sand and gravel in the Las Vegas area during the period approximately from

(D. Nev. May 5, 1972); United States v. Clear Gravel Enterprises, Inc., 2 IBLA 285 (1971), aff'd, Clearqravel v. Keil, Civil

fn. 2 (Cont.)
1952 to 1956, /footnote omitted/ and during that time it had an exclusive lease on the 16 Clear Gravel sand and gravel claims (Tr. 196; Ex. C-H1, C-H2). The 16 claims comprised 2560 acres (Tr. 221-222), which as noted may have contained sand and gravel to a depth of 200 to 750 feet or more. Yet all of the sand and gravel Young and Smith needed during those years came out of a pit on the Clear Gravel No. 1 claim, which pit covered an area of only 3 or 4 acres and was generally less, but not more, than 6 feet deep (Tr. 196, 230).

* * * * * * * *

"In 1955 there were approximately 10 sand and gravel operators in the Las Vegas Valley (Tr. 60-61, 64-65). Three of these operated very close to the Nos. 12 and 13 claims. In 1951 Wells Cargo, Inc., started to operate a pit which is 1/2 mile east of claim No. 12 and is still operating it (Tr. 35, 50; Ex. G-7, G-8, G-9C). In 1953 W-M-K started to operate a pit about 2-1/2 miles southeast of the Nos. 12 and 13 claims and is still operating it (Tr. 35, 54). Young and Smith leased the 16 Clear Gravel claims from the appelant (Ex. C-H1, C-H2), and for the period from approximately 1952 until 1956 (see note 4 supra) Young and Smith operated a pit on the Clear Gravel No. 1 claim, which pit was approximately one mile southeast of the Nos. 12 and 13 claims (Tr. 60, 196; Ex. G-9C). Young and Smith operated the pit at a profit, but stopped operating it when, reportedly due to poor management, Young and Smith went out of business (Tr. 62, 118-119; Ex. G-16 at p. 5).

No. LV 1654 (D. Nev. May 4, 1972). United States v. Osborne, supra was affirmed in Osborne v. Morton, Civil No. LV-1564 (D. Nev.,

fn. 2 (Contd.)

"The Nos. 12 and 13 claims were, for practical purposes, about as proximate to the Las Vegas sand and gravel market in 1955 as were the Wells Cargo, Inc., and the Young and Smith operations. They were also as close, and in some cases closer, to that market than some of the other pits that were operating in the Valley at that time (Tr. 87-88, 186, 220).

"The material on the Nos. 12 and 13 claims is essentially the same material that Wells Cargo, Inc., Young and Smith, and the other operators producing in 1955 mined from their pits (Tr. 41, 61-62, 63-64, 186-187, 215-216).

"There was growth in the construction business in the Las Vegas Valley in the years immediately preceding and since July 23, 1955, but this rate of growth slowed down in 1955 and 1956, and gravel operators were not at full capacity in these years (Tr. 79; Ex. C-C1, C-G2). In any event the 1955 market for sand and gravel in the Valley was being adequately satisfied by the then existing producers (Tr. 45-46, 82-83)."

In United States v. The Dredge Corporation, 7 IBLA 136 (1972), this Board also found a sand and gravel claim in Las Vegas Valley to be invalid and discussed marketability as follows at 141-42:

"At the hearing, Thomas Schessler, a mining engineer, employed by the Bureau of Land Management, testified as an expert witness for the Government. He stated that the contested claim geographically was 4 miles west of the Las Vegas Strip and approximately

March 1, 1972). Two of these judgments were rendered after Verrue. Appeals have been filed in these cases. In the face of these judgments,

fn. 2 (Contd.)
5 miles from the center of town, the center being Fremont and Main Streets. He declared from his study of aerial photographs of the area (Exh. 1-4) that nothing had been removed from the claim nor could any workings be identified on the claim prior to February 28, 1956. (Evidence was also submitted to the effect that an examination was made of the subject land by a representative of the Bureau of Land Management on May 21, 1958, and no improvements were then found during the examination). Schessler further testified that there was loose sand and gravel on the surface to a depth of approximately 3 feet, below which was a 'caliche' layer approximately 5 feet thick. He estimated that the amount of sand and gravel above the caliche on the 40 acres involved was in the neighborhood of 60,000 cubic yards. He stated that approximately 33,900 yards of sand and gravel had been removed from the claim as of September 19, 1969. He indicated that the caliche conglomerate was not competitive in today's market. By geological inference he indicated that there might be approximately 200 feet of usable sand and gravel beneath the 'caliche' layer. He stated that the Wells Cargo pit, (1/4 mile away from the contested claim) on a patented placer mining claim, contained some 'caliche' which had been mined by blasting. The Wells Cargo pit, at the time of the hearing, had been mined to a depth of approximately 60 feet and it had been drilled 100 feet deeper.

"Messrs. E. J. Mayhew and Robert McMillan, geological engineers, testified as expert

however, it is difficult to understand how the majority can even speculate that Verrue has "negated" the District Court's decision of

fn. 2 (Contd.)
witnesses for the appellants. They indicated that the 'caliche' contained on the Dredge No. 51, claim could easily be mined, processed and sold at a profit just as Wells Cargo could mine and sell at a profit. They estimated, through geological inference, that there was between 200 to 1000 feet of usable sand and gravel beneath the 'caliche'.

"The facts of this case are generally undisputed. The claim had a relatively shallow surface covering of a common variety type sand and gravel which type material has widespread distribution throughout the Las Vegas Valley and which is somewhat similar in its nature to deposits which are being worked commercially in the Las Vegas area. Below the surface covering is a bed of dense 'caliche' 5 or more feet thick.

"Examining the record we find that prior to May 21, 1958, there was no evidence or indication that anything had ever been marketed from the claim prior to that date. Extraction of sand and gravel after 1964 is not sufficient to show that material from this particular claim could have been profitably removed and marketed on July 23, 1955.

"Obviously the evidence supplied by the appellant as to the depth of sand and gravel existent below the 'caliche' and the similarity of the material contained on the Wells Cargo claim and the contested claim does not refute the evidence supplied by the Government. Nor did it establish by a preponderance of the evidence the marketability, including proof of present demand for the particular

Osborne v. Hammitt and these and other subsequent Departmental decisions in any respect. They are all in accord with the purposes of the marketability test and their sound foundation should not be undermined by mere semantical legerdemain.

The close scrutiny this Department has and should give to the evidence in these sand and gravel cases where the material is found in such great abundance, but in an area of growing population and increasing and speculative land values is reflected in the above cases and quotations in footnote 2 and in the most recent Board decision pertaining to sand and gravel in Las Vegas Valley in a location as near the center of Las Vegas City as the claim in question here. In United States v. Block, supra, a contestee testified that substantial amounts of sand and gravel had been removed from the claim after 1964,

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fn. 2 (Contd.)
material located on the claim as of July 23, 1955. To satisfy the requirement that deposits of minerals of widespread occurrence be 'marketable' it is not enough that they are only theoretically capable of being sold but it must be shown that the mineral from the particular deposit could have been extracted, sold, and marketed at a profit. United States v. J. R. Osborne, et al., 77 I.D. 83 (1970)."

and between 3,000 to probably 7,000 cubic yards prior to 1955. He did not, however, offer documentary or other evidence to substantiate his testimony, or show evidence showing his cost or price at which the sand and gravel was sold. This Board held that the contestee, as the party having evidence peculiarly within his knowledge or control, must support his direct testimony with specific corroborating evidence or he will be deemed to have failed in his burden of proof. The decision also emphasized the long-standing rule that proof of discovery, and this includes marketability as to sand and gravel claims, must be established for each claim. "It is not enough to offer evidence for the claims as a unit." Id. at 12 IBLA 404, 80 I.D. ___. Thus, whether the sand and gravel from the patented claims was marketable does not establish that the deposit on this claim was marketable and continuously so, as required.

There are large evidentiary gaps in the present record and inconsistencies. The majority noted that the Government witness said he had studied economic reports and other information concerning sand and gravel and marketing conditions in the area, but apparently feels this gap in failing to introduce such evidence does not warrant further inquiry.

See by way of comparison in this regard, primarily to evidence omitted by a claimant, the majority in United States v. Wells, 11 IBLA 253 (1973).

The present majority assumes that the costs of the operation on Sorefoot No. 10 would be the same as the patented portion of the claim. However, evidence indicated that in 1955 and some years thereafter the patented portion was closer to a paved road and costs of transportation would be increased by further haulage and by haulage over an unpaved road prior to the extension of another road. Slight differences in costs, as the evidence indicated, could very well spell the difference between the ability of a competitor to compete successfully in the market and his inability to do so.

The majority also assumes profitability of the operation on the other claim and a hypothetical profitability of this claim because of general statements to this effect made by contestees' witnesses. However, there is not sufficiently adequate corroborative data and proof to support the hypothetical conclusion of profitability for this claim. As previously mentioned, unexplored are the reasons why Thacker, Gornowich's President, discontinued his allegedly profitable operation.

It is his election not to proceed on to this claim but to stay on the other portion of the claim, which the majority relies on to sustain this claim. Yet, his leaving the operation "because of the problems involved," tends to raise doubt as to his optimistic generalities concerning profitability.

The record is also inconsistent on another evidentiary matter upon which the majority so greatly relies. This concerns Thacker's testimony that there was material on Sorefoot No. 11 for only several years' supply, so No. 10 was desired for a reserve. (Tr. 32.) The Government's mineral report, (Ex. G-4), prepared by Stanley Y. Shepard, a mining engineer, and essentially verified by the Government's witness at the hearing, indicated removal of material from the Sorefoot Gravel Claim No. 11 to depths of four to six feet, and that gravels exist down to hardpan to depths of six feet along the south boundary and to 12 feet or more on the north of both claims. The report (Ex. MC-2) prepared by contestees' mining engineer, C. P. Keegel, goes further in estimating the extent of the deposit. He concludes:

> 1) There are abundant reasons geologically to project the gravels on the subject premises to at least 25'

in depth at an acceptable and relatively uniform quality.

* * * * * * *

3) It is reasonably likely that the gravels will extend 50 feet or more, in depth.

* * * * * * *

6) That sufficient reserves are present for commercial production at a profit.

Nowhere do I find in his report, his map, nor his testimony, support for the majority's conclusion that the sand and gravel on No. 11 will be exhausted within a few years. Indeed, Keegel's report and his testimony contradicts Thacker's testimony that there was not sufficient material on Sorefoot No. 11 to last more than a few years. Keegel's report, and other evidence in the record upon which the majority relies, show that the materials and geologic conditions are the same as to both claims. Keegel testified that the available material on Sorefoot Number 10 to a depth of 25 feet excluding cemented material of about four feet would be "on the order of four million yards of gravel, all usable." (Tr. 71.) As to the first five feet of that claim he estimated 900,000 cubic yards. Id. His esti-

mate of the amount of material excavated on the south half of the southeast quarter of section 21 and the northeast quarter of section 28, directly south, was approximately 400,000 yards. This 160-acre portion has been patented and includes Sorefoot No. 11. (Tr. 70.) Therefore, from the 1953 date of location of those claims to the time of the hearing in 1969, less than half of the estimated amount of material in the first five feet of the Sorefoot No. 10 claim had been removed from an area twice its size. At that rate (a 23-year period), if we assume that Sorefoot No. 11 also had 4,000,000 cubic yards to a depth of 25 feet, there are easily reserves on that 80-acre claim alone to last conservatively well over a hundred years, and much longer at a depth of 50 feet.

Therefore, Thacker's testimony that the Sorefoot No. 10 was needed as a reserve is contradicted by the claimant's other witness and is simply incredible and unbelievable. The majority says that it has not been established by the appellant that the market is so saturated with available supplies that material from this claim cannot be profitably utilized. However, the data submitted by contestees shows sufficient facts that this conclusion is inescapable. The majority also draws a

distinction between this situation and where glass manufacturers control a monopoly of the production. The situations should not be treated any differently, as the hypothetical possibility is the same.

To conclude, this Department has the duty to determine carefully when a patent is to be issued for a sand and gravel claim that the evidence clearly establishes all of the criteria of the marketability test, including the safeguards of present demand for the materials on that claim and bona fides in development. We must assure that the authority to determine the validity of claims "is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States, 252 U.S. 450, 460 (1920).

Before assuming the hypothetical probabilities of marketability at a profit, clarification of the evidentiary gaps and inconsistencies in the record should be made. To ascertain whether the material could have been marketed at a profit consistently over the time period from 1953, when the lands were classified for small tract purposes, and thereafter, more information is needed. This would include further information about Gornowich's operations and Thacker's reasons for

ceasing his business. Evidence set forth in other sand and gravel cases (see footnote 2, for examples) establishes the vagaries of the sand and gravel business in Las Vegas Valley during the time period in question. Operators moved in and out of the area. It was a time of ups and downs. Official notice may be taken of the public records of the Department of the Interior and of any matter of which the courts may take judicial notice. 43 CFR 4.24(b). The parties should be afforded the opportunity to submit evidentiary matter of which official notice may be taken to help overcome some of the gaps in the record before us.

Because the land has been classified for small tract purposes, it is apparent that the lands are valuable for purposes other than the sand and gravel. Further information as to the value of the land should be ascertained to assure that all the requirements discussed before have been met, including whether the land is mineral in character under the appropriate test (see, e.g., United States v. Northern Pac. Ry. Co., 1 F.2d 53, 57 (D. Mont. 1924)), and that the land is sought for mining and not other purposes. As stated by the Supreme Court in United States v. Coleman, 390 U.S. 599, 603

(1968):

> The marketability test also has the advantage of throwing light on a claimant's intention, a matter which is inextricably bound together with valuableness. For evidence that a mineral deposit is not of economic value and cannot in all likelihood be operated at a profit may well suggest that a claimant seeks the land for other purposes.

There should be no doubt as to the value of this deposit under the marketability test before patent issues for the claim. As in Block where uncorroborated evidence of sales was determined to have no evidentiary weight, so too should mere opinions, which could very well be applied to almost every legal subdivision within the Las Vegas Valley, if we make all of the assumptions upon which those opinions are based. Time is a proper factor for evaluating the credibility of these opinions. If development of a claim is made soon after the critical date after which the claim could no longer be located, an opinion that the material could have been profitably marketed a year or two earlier has more credibility than where development is not undertaken

for 14 or more years thereafter.

There was sufficient evidence in this case to establish the presumption of nonmarketability of the product from this claim due to lack of sales and development of the claim. To overcome this presumption the proof must be stronger than these mere speculative opinions. As stated in Charlson Realty Company v. United States, 384 F.2d 434, 444 (Ct. Cl. 1967):

> A presumption cannot be overturned or rebutted by speculation or suspicion. It can only be destroyed or overcome by convincing and uncontradicted evidence to the contrary which clearly and distinctly establishes a fact so that reasonable minds can draw but one inference. Falstaff Brewing Corp. v. Thompson, 101 F.2d 301, 304 (8th Cir. 1939), cert. denied, 307 U.S. 631, 59 S. Ct. 834, 83 L.Ed. 1514; Wolfgang v. Burrows, 86 U.S. App. D.C. 340, 181 F.2d 630, 631 (1950), cert. denied, 340 U.S. 826, 71 S. Ct. 61, 95 L.Ed. 606.

I am not persuaded that there is credible evidence in this case to support a finding that that material could be profitably marketed from this claim in 1953 and continuously thereafter. The evidence clearly establishes

that there was a sufficient reserve of materials on the Sorefoot No. 11 claim to last for more than 100 years and that this claim was not, in fact, needed for a reserve. This fact, alone, destroys the claimant's case and the majority's reliance on Thacker's "election" to hold the claim as a reserve. I would reverse the Judge's decision, or at least, set it aside and order a new hearing to establish further evidence, as discussed above, to assure that the land is not being misappropriated for purposes other than the mining laws.

The claimants after the hearing requested that the hearing be reopened to permit them to introduce further evidence that assessment work was performed. The Judge refused to do so. At the very least, a further hearing should be allowed to require them to show such evidence and any other evidence which would show what, if any, actual expenditures or work was done on the claim and when.

Joan B. Thompson, Member

I concur:

Martin Ritvo, Member